

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

STEVE C. WATTS,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Administrative Law Judge Mary S. McClatchey heard this case on February 4 and 5, 2003, 2003. Susan Tyburski, Esquire, represented Complainant Steve Watts. Assistant Attorney General Hollyce Farrell represented Respondent Department of Transportation ("CDOT").

MATTER APPEALED

Steve Watts ("Watts" or "Complainant") appeals his disciplinary termination. For the reasons set forth herein, Respondent's action is affirmed.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious, or contrary to rule or law.

FINDINGS OF FACT

1. Complainant was hired as a Transportation Maintenance Worker I ("M I") by CDOT on December 1, 1999. He worked on the Loveland area patrol.

Background

2. Watts was raised by his father and other mentor figures to have a high regard for safety rules and regulations. Once, when working on a construction site, he was ordered to go underground to address a problem, and was buried up to his neck in a pile of rock. He was in the hospital for two weeks, paralyzed from the neck down. He has seen others lose limbs in construction accidents. These experiences impressed upon him the importance of safety on the job.

3. When Watts and the other M I's were hired at CDOT, they were required to sign a safety policy entitled, "CDOT Personal Protection Equipment Acknowledgement," which mandates the use of personal protective equipment listed therein when appropriate, as a condition of employment. The document states in part, "I further understand that state and federal laws provide that employers require employees to use personal protective equipment. . . I understand that I and my dependents may not be entitled to full Worker's Compensation benefits or departmental injury leave benefits if I fail to use protective devices provided or required by the Department of Transportation." Failure to follow the policy can also result in imposition of a fine on the breaching agency.
4. Watts initially worked under Ray Mumfort, a Transportation Maintenance Worker II ("M II). Watts noticed that some Loveland crew members did not routinely follow the safety rules. When he mentioned this to Mumfort, he told him to do as he was told and he would be fine. Mumfort also commented that his rules governed the Loveland worksite, not those of CDOT.
5. Mumfort re-hired Shaun Frey on the Loveland patrol crew in the winter of 2000. Frey had worked on the crew for a number of years previous to Watts' hire. Mumfort put Frey on a pedestal, and accorded him special treatment, such as inviting him on avalanche reduction missions that were not part of his job duties.
6. Frey and Watts quickly developed an intense dislike for each other. In fact, both Frey and Scott Garvin, Watts' coworkers, treated Watts poorly. They would make statements to him such as, "You are a dumb ass, you don't know what you are talking about," "get used to the fact that you are just here to pick up the slack when we need you," "you are going to get blamed for anything that happens up here," and, "I can't understand why CDOT hires dead weights like you."
7. Prior to Frey's arrival on the patrol, Watts was outgoing and talkative on the job, and he enjoyed joking with his coworkers. There was a lot of horseplay on the job, some of it dangerous.
8. Watts received performance ratings of Fully Competent for the periods 1999 - 2000 and 2000 - 2001. In the specific areas of People Skills and Human Resource Management, he received Fully Competent ratings.
9. Watts requested a transfer from the first shift (4 a.m. to 12 noon) to second shift (12 noon - 8 p.m.) to get away from Garvin and Frey. Mumfort granted this request some time in the late summer of 2001.
10. From that time forward, Watts worked with Gregg Goodland and Don Haskins on the second shift. He got along well with both of them. Watts saw Frey and Garvin daily at the beginning of his shift for approximately 30 minutes.
11. In late August 2001 Joe Kramarsic replaced Mumfort as M II on the Loveland patrol. He

had been informed of the rift between Watts and Frey and Garvin. Watts quickly made it clear to Kramarsic that he disliked Frey and Garvin and resented what he felt was the favoritism shown to them, particularly Frey. Kramarsic did little to address the favoritism shown to Frey.

12. Watts mentioned safety violations among the work crew to foreman Harvey Lovato, Transportation Maintenance Supervisor III (Kramarsic's supervisor), in 2000 and 2001 on at least two occasions. He mentioned the issue to Kramarsic at least once in late 2001.

Watts' Positive Drug Test and Reports of Safety Violations to Appointing Authority

13. In late September 2001, Watts tested positive for marijuana during a random CDOT drug test. The pre-disciplinary meeting was held on October 30, 2001. Present were his appointing authority, Jeffrey Kullman, Region I Transportation Director for CDOT, Lovato, as Watts' representative, Chuck Loerwald, Maintenance Section 5 Superintendent, and Catarino Martinez, EEO Officer for CDOT. Watts admitted to having used marijuana and did not contest the drug test results.
14. Kullman has an informal, approachable manner. At the pre-disciplinary meeting concerning the drug test, after Watts admitted that the positive test was accurate, Kullman asked Watts a series of questions, including whether he was happy in his job, and whether there were any other issues concerning the patrol he wanted to discuss.
15. Watts stated that he had concerns regarding safety violations by the crew that were going unaddressed by Kramarsic and others. Specifically, he informed Kullman and the others of the following: workers were not wearing safety vests on a routine basis; workers were not using avalanche beacons as required; workers were not conducting pre- and post-trip inspections on the trucks on a routine basis; and Kramarsic was aware of these safety breaches and did nothing about it.
16. After the pre-disciplinary meeting, Kullman ordered Lovato to look into all of the alleged safety violations, and to address them. Enforcement of safety regulations is one of Lovato's primary responsibilities; in fact, he holds monthly or bimonthly safety meetings with the CDOT road crews. Lovato generated a list of safety issues for all of his M II's, including Kramarsic, to bring back to their crews for enforcement. The list included use of safety vests at all times, use of proper signs, and other regulations. He ordered his lead workers to assure strict compliance with safety regulations. Lovato did his best to assure that safety regulations were enforced.
17. On October 30, 2001, Respondent issued Watts the standard disciplinary suspension of 30 days for a first-time positive drug test. Watts was allowed to serve the suspension in one-week increments over a four-month period, November 2001 through February 2002.

Watts' return to work in early November 2001.

18. Watts' first week of suspension was in early November 2001.
19. Upon his return to work, two things occurred which led to a markedly different, tense situation on the Loveland patrol. First, word had gotten out that Watts had "ratted out" his co-workers for not complying with safety rules. A few days after his return, Kramarsic confronted Watts about having informed Kullman about his failure to enforce safety rules. During shift change, Frey and Garvin's verbal harassment of Watts escalated. They often told him to "shut up" and to "keep his mouth shut."
20. Watts never reported this treatment to anyone at CDOT.
21. Second, Watts' general attitude became extremely poor. Even his closest friend at work, Goodland, noticed a significant change in him. Watts complained to Goodland on a weekly basis over the next few months that he had been set up on the drug test, and that individuals at CDOT were out to get him. In addition, his hostility towards Garvin and Frey intensified. Watts spoke negatively of Shawn Frey on average every other day to Goodland.
22. Watts frequently called Lovato to inform him that a co-worker had hurt his feelings, and he needed to go home and use sick leave. He did in fact use sick leave when he became so upset that he could not come to work the next day.
23. After his return to work in November 2002, Watts' legitimate concerns about safety issues became a means of "getting back" at co-workers he disliked and resented. He used constant complaints about alleged safety violations as a means of attempting to get his co-workers into trouble, to even the playing field.
24. Some of Watts' complaints were valid. While the crew complied with most safety regulations on a regular basis, occasionally they would fail to wear a safety vest or to perform a post-trip vehicle inspection. However, Watts himself also sometimes failed to conduct pre- or post-trip inspections on CDOT vehicles.
25. Watts' complaints were sometimes unfounded or trivial. Often, he would report a problem before checking out whether it was truly founded. For instance, he once reported a defective light on a vehicle, and a routine check of the wiring the next day revealed that it simply needed to be re-connected. Once, after a serious accident on the highway, Lovato pulled over and started helping to direct traffic around the accident. Watts approached him and immediately asked him where his safety vest was. Given the emergency nature of the situation, Lovato felt it was more important to direct traffic than to go get a safety vest.
26. In response to Watts' repeated complaints, Kramarsic drafted a safety report regarding use of safety vests and required all crew members to sign it. Watts continued to complain about violations of the safety vest rule.
27. Watts complained to Lovato so often that it became a source of irritation. Lovato once told

Watts to take care of Steve Watts and to allow Lovato to take care of the other people.

November 11, 2001 and late Fall 2001 Performance Documentation Forms.

28. On November 11, 2001, Kramarsic saw Watts during shift change. Kramarsic engaged Watts in routine conversation about work to be done in the shop. Watts turned the conversation towards his longstanding dislike of Frey and Garvin, and his perceived notion that he had been unfairly blamed for incidents that had occurred in the past. He complained again about other crew members being favored over himself.
29. Kramarsic tried to turn the conversation to other matters, but Watts was upset and agitated and would not let the matter drop. He finally stated, "It's a good thing I am not working on the same shift as Shaun and Scott, or I would have to carry out my plans." Kramarsic did not ask Watts what he meant by this statement. At the end of their conversation, Watts stated, "I'll just come to work and keep my mouth shut," or words to that effect.
30. Kramarsic was sufficiently concerned about Watts' agitated and hostile behavior, particularly his threatening statement, that he wrote up a Performance Documentation Form on the incident.
31. Watts often complained to Kramarsic about other patrol members blaming him for any problems that arose on the crew. Kramarsic saw Watts lose his temper on the job with increasing frequency in the Fall of 2001. Watts had recurrent temper tantrums, in which he would leave the worksite and drive off in his own truck.
32. In late Fall 2001, Kramarsic issued a second Performance Documentation Form on Watts. It stated in part, "Steve has done mostly acceptable work but his work performance has been affected by attitude and behavior. Steve needs to improve and be aware that anger, frustration and temper tantrums have detracted from work performance. Steve must also learn to accept responsibility for his actions and understand the chain of command. He also must accept a willingness to work with others on the patrol being a team player. . . Steve has sought help for his work problems and is attempting to improve his attitude and relations with others."

November/December 2001

33. Once in mid-November, Watts worked with Frey and Garvin alone on the morning shift, which was unusual. When he had difficulty with the job he was doing, Frey and Garvin said to him, "What's wrong with you, can't you handle the job? Why did CDOT hire a worthless person like you? You're not man enough for the job," or words to that effect.
34. Watts became so upset he threw the chain he was working with into his truck and drove away. When he was over the mountain pass, he ran into John Bardoni, the Senior Foreman. He was very upset and told Bardoni about Frey and Garvin's treatment of him. Lovato then drove up. Watts talked with both men, and they suggested that he see a counselor about the

stress he was enduring on the job.

35. Watts did see a counselor through the state employee assistance program. However, he felt that the counselor was unresponsive and Watts deemed it to be a waste of time.

December 2001 Corrective Action

36. Once Kullman received a copy of the Performance Documentation Form concerning Watts' statement about "carrying out his plan," he became very concerned, and directed Catarino Martinez, EEO Officer, to investigate the matter. Martinez interviewed Garvin, Frey, and Kramarsic, and received additional reports of alleged acts of a violent or hostile nature by Watts.
37. Based on this investigation, Kullman scheduled a pre-disciplinary meeting with Watts to discuss his alleged behavior, and to address Watts' allegations of hostile conduct by Garvin and Frey directed at him.
38. On November 30, 2001, Watts attended the pre-disciplinary meeting with his union representative, Martinez, Kullman, and Charles Loerwald (Maintenance Section 5 Superintendent). At the meeting, he admitted to having made the statement about "carrying out his plans" to Kramarsic, and stated that he had meant it in the context of assuring that his co-workers followed safety procedures. He also admitted to having thrown a chain into the back of a truck in anger; to having a temper problem; and to frequently using sick leave if angry about issues at work.
39. On December 3, 2001, Kullman issued a Corrective Action letter to Watts for violation of CDOT's workplace violence policy, Policy Directive 10.0. Watts did not grieve the Corrective Action. The letter cited Watts for stating that he would "carry out my plans" to Kramarsic, and for additional hostile behavior. It stated, "It is my opinion that upon investigation and your responses that none of these actions are, at this time, a severe risk to CDOT or your co-workers. However, they are clearly a violation of Procedural Directive 10.0, as these actions do create a hostile environment You admit to having a problem with anger and that you even avoid work, calling in sick, when you cannot cope with work or the actions of others you work with Taking time off using sick leave because you are frustrated cannot be tolerated In the future, I will expect and I demand that you be aware of your behavior and attitude. Any act by you that unnecessarily creates an unsafe or unhealthy work environment due to threats, intimidation or harassment towards your co-workers will not be tolerated."
40. The Corrective Action mandated that Watts:
 - attend workplace violence, anger management and conflict resolution training;
 - refrain from bringing a knife with a blade exceeding three inches to work;
 - refrain from using sick leave to avoid work when not ill;
 - refrain from all acts of 'horseplay';

- respect all CDOT property and not toss, throw, or take action that could damage property;
- walk away from tense interactions with co-workers; and
- contact his foreman or junior foreman if actions of co-workers cause concern, or call Martinez, Loerwald or Kullman regarding those concerns.

January 2002

41. Watts attempted to participate in workplace violence training, but the class was repeatedly cancelled for budgetary reasons.
42. In January 2002, while Watts was on one of his week suspension leaves, his co-workers, Goodland and Haskins, found a rope and made a noose out of it. They hung the noose in the shop and placed a note on it saying, "Are your tools clean and put away?" Goodland and Haskins meant this as a practical joke, because all Loveland crew members knew that they were sticklers about cleaning and putting away all tools before leaving work.
43. The noose and the note hung in the shop for approximately a week. When Watts returned from his week away, he saw it. He did not feel threatened by it because Gregg and Donnie were his friends at work. He did, however, take a picture of it to demonstrate that management had tolerated verbal harassment of him and the noose practical joke, but that he had been singled out for workplace violence in the Corrective Action.
44. In January 2002, Watts began to suffer from fainting spells from the stress he was feeling at work. He saw two doctors, one for a full physical assessment, who found no physical problems, and one for a psychiatric assessment, who determined he was suffering from work related stress.
45. Watts' doctor instructed him to leave stressful situations at work by walking away, relaxing, and then returning after regaining his composure.

March - April 2002

46. During the period March through April 2002, Watts' hostile behavior intensified again. He was having temper tantrums on a regular basis, in which he would become upset during an encounter with a co-worker, and would drive off the worksite in his truck. These tantrums occurred approximately three times per week.
47. In late March or early April 2002, Watts backed a truck over an ice ridge. The brakes on the truck were later found to be broken. Watts was informed when off duty that his supervisors thought he had caused the problem with the truck, and he grew progressively angry about being blamed for it. When Watts arrived at work, Kramarsic asked him what had happened, and Watts "flew into a rage," walked out of the room, and started throwing tools into the tool box in an angry manner. Watts was shaking uncontrollably. Kramarsic found Watts' inability to control himself very troubling.

48. During this period, Watts continued to speak negatively about Shawn Frey to Goodland on average every other day. He continued to harp on his theme that other workers were getting a better shake than he was. Goodland was concerned that Watts could not put past issues aside and move forward, and encouraged Watts to do so. Watts was unable to.
49. The Loveland crew complied with safety regulations most of the time; occasionally, a crew member neglected to wear a safety vest or to conduct a pre-trip inspection.
50. In March 2002, Watts contacted Kullman by telephone to inform him that some safety violations were still occurring, particularly the failure to consistently wear safety vests. When Lovato and Kramarsic learned of this, they were not pleased that he had gone above them, bypassing the chain of command.

2001/2002 Performance Evaluation

51. On April 10, 2002, Kramarsic and Lovato issued Watts his annual Performance Evaluation, which was an overall rating of Good. However, Kramarsic and Lovato both rated him Needs Improvement in the areas of People Skills and Human Resource Management due to the above-described conduct.
52. At the meeting, Watts asked whether his failure to following chain of command was a concern. Lovato informed him that his concerns regarding other crew members' use of signage and hard hats should not be raised to Jeffery Kullman, but to him and other foreman first.
53. After receiving his evaluation, Watts was even angrier about his situation. He decided to simply withdraw from conversation and refused to talk socially to his co-workers during the 30-40 minute shift change period. During these silences, he stared in a hostile manner at Frey and Garvin. This caused a lot of strain on the patrol.
54. Another means Watts used to express his anger at work, and to try to intimidate Frey and Garvin, was to slam notes in the "out box," which was for managerial use. He informed Goodland that he did this to make others nervous about what he had written on the notes.

April 25, 2002 Incident with Goodland

55. As related above, Watts worked most closely with Gregg Goodland, who was his closest confidante on the patrol. Goodland shared Watts' belief that Frey was given special treatment. They often discussed hunting and target shooting and guns in general. Watts often confided in Goodland that he felt he was a harder worker than the rest of the crew, and that there was a CDOT conspiracy to "get him."
56. Watts shared stories with Goodland about how he had used guns on several occasions. In

one incident he shared, the previous summer, he and another group of campers had a conflict, and he had shot at them as they drove off down the road. One of the campers was a local sheriff, who did not pursue charges as he was not supposed to be there. On another occasion, the local animal control was in the area near his house, a conflict arose, and he shot one or more shotgun blasts in the air to scare them off.

57. Watts also told Goodland about his second job at a mine, working for a close friend. He gave the impression that he had access to the entire mine site, including the explosives used there.
58. On April 25, 2002, Watts' general hostility was finally directed at Gregg Goodland. On that day, Goodland arrived at work early, in very high spirits. Garvin and Frey, who were going off shift, teased him about being early. They were all having a good time together when Watts arrived. Goodland said hello to Watts, who did not answer, but brushed against him to get into the office. Watts shoved some letters into the "out box." Goodland, Garvin and Frey continued to talk, and attempted to include Watts in the conversation. Watts bowed his head and remained silent, glaring at them, particularly Frey, in a hostile manner, for approximately twenty minutes.
59. Watts and Goodland started working together, to get a compressor hooked up. Goodland was attempted to unhook a part from the air hose, when Watts came over and pushed him aside, took the hose from his hands, and started beating on it with a pipe wrench in an angry manner, instead of using the preferred method of pushing the pieces together carefully and then turning them.
60. Watts put the air hose away, and Goodland asked him if the jackhammer went with it or stayed. Again, Watts ignored him and refused to answer.
61. Watts' behavior was extremely upsetting to Goodland. He told Watts he couldn't work with his attitude anymore, and left the worksite. Goodland called Lovato when he got home. Goodland met with Lovato that afternoon, and handed him a written report of the day's incident. He told Lovato he was considering resigning, due to the pressures of working on the patrol.
62. Watts' behavior that day, combined with previous conversations about how Watts had used guns to "get his way" and had access to explosives, and the temper tantrums he had seen, led Goodland to be fearful of Watts. At the time those conversations took place, Goodland took no note of them. Now that Watts' hostility had been turned against Goodland, however, Goodland found the statements to be concerning.
63. In addition, Watts' inability to stop discussing Frey, combined with his knowledge that Watts had driven by Frey's house, also caused Goodland concern now. Frey's home was not on Watts' way to work.
64. Goodland had also witnessed Watts' hostile behavior towards others at work escalate over

time. He had discussed this with Watts, telling him he needed to move on. However, he saw now that Watts was unable to control his hostility.

65. Goodland now feared for his own and his wife's safety. He told his wife about the incident with Watts and his previous comments concerning gun use and access to explosives. That night, she called Goodland to drive her home from a neighbor's house, because she was afraid to walk home.
66. Frey and his wife were also fearful of Watts at this time, because Watts had no reason to drive by their home on his way to work.
67. Once Kullman learned of the incident with Goodland on April 25, he assessed the situation. Watts was scheduled to be in a training academy the entire next week, so he determined that he would begin a thorough and exhaustive investigation of the workplace situation. He enlisted the help of Loerwald and Martinez, both of whom had been trained in workplace violence issues. He also spoke to Estrick, Lovato, and Bordony.

CDOT Threat Assessment Team

68. Kullman asked the CDOT Threat Assessment Team to conduct an initial threat assessment of Watts. He had been present at the fatal shooting of a former CDOT employee in 1999, and was very sensitive to and knowledgeable about violence in the workplace.
69. Dr. Doris Gundersen led the threat assessment team. Dr. Gundersen had assisted in drafting CDOT's workplace violence policy, and was certified at hearing as an expert in workplace violence. She concluded that Watts should be placed on administrative leave because he posed a risk of violence in the workplace.
70. Some the factual assumptions upon which Dr. Gundersen relied were not proven at hearing. However, the majority were proven. Allegations not proven include: he threw a wrench, almost hitting an employee he disliked, and, he carried a knife and gun in his car, and informed co-workers of this.
71. The most salient facts considered by Dr. Gundersen, proven at hearing, were the following: his statement about carrying out a plan; his inability to control his physical response to anger, by beating on equipment at work and twice throwing tools (the chain and the ax); he was chronically angry and felt persecuted; he spent an inordinate amount of time thinking about another person he was angry at, had driven by his home, and now this employee and his wife felt they were being stalked and feared for their safety; he stared at co-workers angrily, causing an uncomfortable climate of fear in the workplace; he had shared stories about using guns to resolve disputes; and finally, despite a prior corrective action for violation of the workplace violence policy, he continued to violate the policy.
72. Based on the initial threat assessment, Kullman decided to place Watts on paid administrative leave on May 7. Kullman came to the worksite and had a brief conversation

with Watts before handing him the letter personally. Watts reiterated a desire for a transfer and stated that the Loveland patrol worked differently from the rest of CDOT. He stated things would be fine if Shaun had never come on the crew.

May 7, 2002 Kullman interviews on Loveland patrol.

73. On May 7, Kullman interviewed Joe Kramarsic and the four M I's on the Loveland patrol. Before interviewing the men individually, Kullman held an "open meeting" with the crew as a group. He explained that he was not on a witch hunt, that he would interview them individually, that he sought a fair and objective discussion, and that he would ask only open and not leading questions.
74. The crew first informed him that initially, everyone had enjoyed working with Watts, but that now he frequently throws tantrums and drives off in his truck. Kullman asked how often this occurred and Goodland stated, "conservatively about three times each week." They also stated that Watts was always complaining about someone.
75. The crew also reported that Watts is very often quiet, and that he stares at them in a way that is very scary. They reported that the bulk of Watts' problems are with Shaun Frey. They affirmed that the former M II, Ray Mumford, was very fond of Frey and placed him on a pedestal, and that no one in management had the guts to challenge him on this. They reported that this had not changed under Kramarsic's management.
76. Kullman asked if the crew picks on Watts. Kramarsic and the crew responded that the entire crew picks on each other, but that no one picks on Watts anymore because when they had, he felt everyone was out to get him.
77. The crew also indicated that Watts does not know when to drop things, that he can't let go of an issue even long after it has occurred. They informed Kullman that Watts let everyone know that he was working at a mine and that the owner had given him a key to the entire mine, which included access to explosives.
78. Regarding safety concerns raised by Watts, the crew admitted that on occasion a post-trip inspection is not done, and that is wrong, but they felt the responsibility lies with the current driver to conduct a pre-trip inspection.
79. The crew informed Kullman about an "ax incident" that had occurred in September of 2000, about which Kullman had been previously unaware. A number of crews were placing plows on trucks for the winter. Two co-workers had used bolts to hold the plow onto the frame of the truck. Watts was attempting to insert the pins into the holes, but the space was tight and he had difficulty. Watts become so frustrated that he got up angry, picked up an ax, and threw it over 30 feet into a one-ton truck. Patrol members from a variety of crew areas were present, and the incident upset them. This incident had become widespread knowledge on CDOT road crews.

80. In his individual meeting with Kullman, Kramarsic informed him first that Watts never argued with him and was respectful of his authority. However, he stated that Watts often internalizes conflicts and frequently drives away in anger, throwing tantrums over minor things all the time. Kramarsic indicated that Watts blames everyone for all problems on the crew, is difficult to work with, and that all other crew members are very cautious around him.
81. Kramarsic was not afraid of Watts hurting him, but he was concerned for the safety of his crew.
82. Kramarsic also indicated that Watts appeared to be motivated by revenge, and that revenge was a factor in his looking for ways to get his co-workers in trouble. He viewed Watts' complaints about co-workers not wearing vests, beacons, and trip inspections as Watts' way of attempting to get even with Frey and to get his co-workers into trouble, to even the scales.
83. Goodland informed Kullman that the last month had been particularly bad, as Watts had really vented during that time. He said that since filing the complaint against Watts, he was very fearful and had even considered arming himself. His wife was very fearful of Watts, and that had resulted in some changes in the way his family operates. They were very cautious and his wife would not go out at night.
84. Goodland also informed Kullman that Watts feels he is a harder worker than the rest of the crew, and there is a conspiracy to get him out of CDOT; Watts had shared several stories of using guns to resolve problems, including shooting at other campers and at animal control officers near his property.
85. Shawn Frey stated that Watts frequently drove by his house and made this known to him. He felt Watts was stalking his family and stated that he was seeking a restraining order from the Clear Creek County Sheriff.
86. Kullman was extremely concerned by what he heard, particularly the fact that the adverse effects of Watts' conduct had reached beyond the workplace, to Goodland and his wife and to Frey and his wife.

State Personnel Board Rule R-6-10, Governing Pre-Disciplinary Meetings.

87. State Personnel Board Rule R-6-10 states in part as follows:

"When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision"

R-6-10 Meeting - Discussions Regarding Exchange of Information.

88. On May 24, 2002, Watts and his attorney attended the pre-disciplinary meeting with Kullman and Cotty Martinez, EEO Representative for CDOT.
89. Kullman conducted the meeting primarily by asking questions and discussing a number of issues regarding Watts' relationship to his co-workers, foreman team, and supervisory team. They had in-depth discussions regarding safety issues.
90. In the middle of the meeting, after a break, Watts' attorney stated to Kullman, "I don't want to interfere with any question that you have of Steve, but at some point, it is my understanding from reading the rules that you are going to give us what you have; the allegations against Mr. Watts."
91. Kullman answered, "No, no I don't have to give you those. Not when there is workplace violence."
92. Watts' attorney then stated, "but when I read that rule, it said that you will share with us the information that you have, and the allegations that you have and allow us a chance to respond. So I guess I am requested that under the rules."
93. Kullman responded, "Yeah, okay. We have on record that I'm not required to give you the names or what people are saying in these areas for fear of retaliation."
94. Watts' attorney then stated, "I understand that there might be some information like exact names of people who make allegations, but it is impossible for Mr. Watts to respond unless he knows what he is being accused of. So, I'm sensitive to your concern to protect people, but he needs to know what he is being accused of before he can answer."
95. At another point in the meeting, Watts' attorney stated, "it is impossible for us to respond to this unless we know what has been said so that he can respond to it specifically. And we would love to do that." Kullman stated, "You will be able to get that all from Steve"
96. After it became clear in the meeting that the source of allegations of workplace violence was Watts' co-workers, his attorney again asked for their statements. She stated, "You must have notes or do you have statements from them?" Kullman responded, "Just listening to them and getting ready for this meeting today, Sue." Watts' attorney then stated, "Well we would request at least a summary of what this is. . . . You are asking vague, general questions. He has no idea what anyone has said about him. It's impossible for him to respond."
97. At the end of the meeting, Watts' attorney again asked for "specific allegations that have been made against him to allow us a chance to fully respond to them."
98. Kullman did have a type-written summary of the statements made by Watts' co-workers on April 7, 2002, Exhibit N. He did not provide a copy of those notes to Watts or his counsel until the middle of the evidentiary hearing.

R-6-10 Meeting - Exchange of Information.

99. Notwithstanding the above conversations, Kullman did in fact reveal the majority of allegations against Watts in the course of the R-6-10 meeting. He did so primarily by asking Watts questions about alleged behavior.
100. In the course of the meeting, Kullman outlined the following allegations against Watts and Watts gave the following responses:
- A. Kullman asked if Watts comes in to work and says nothing to the other five crew members from first and second shift. Watts explained that he stopped talking after he got the April 2002 performance evaluation, in which he got the message to stop complaining about safety violations and stop calling Kullman directly. Kullman asked Watts what he did when he came in and did not talk to anyone. Watts explained that when he arrived at work and all five shift members were present, he did not talk at all on a social level, just about work related issues if necessary. He explained that once Frey and Garvin left, he would talk to Goodland and Haskins.
 - B. Kullman asked if he ignores the other people in the crew. Watts said he doesn't ignore them, but he would come in, sit down, be quiet, and then communicate as needed on the job.
 - C. Kullman asked if he stared at his co-workers. Watts said no.
 - D. Kullman asked if Watts ever gets so angry that he has to leave the workplace, or leave the room, because he is so angry; Watts responded that when he works on something and it doesn't go right, he gets frustrated and will walk away from it and have a cigarette to relax and then everything falls together.
 - E. Kullman asked Watts if he routinely gets angry at work. Watts stated, "I don't get routinely angry at work. No."
 - F. Kullman asked, "Have you ever thrown anything? Particularly in an emotional state where you were probably a little bit upset?" Watts asked, you mean clear across the room? Kullman said yes. Watts stated he had never done that.
 - G. Kullman asked, you've never thrown a wrench, or an ax, at work? Watts pointed out that his previous corrective action was for throwing the wrench at work. Watts explained that he had thrown an ax into the back of a one-ton truck, a distance of from where he sat to the wall. Later in the meeting, Kullman asked Watts to explain the ax incident. Watts explained he was having difficulty with a job. Shawn Frey, Scott Garvin, and Ty Anderson, from another crew, came over and said, "Aren't you done with that yet? What's wrong with you? You stupid? You can't put that damn bold nut on that bolt?" Watts said he responded that he didn't have to tolerate that, picked up his tools, put them in the back of his one-ton truck, and left. Kullman said that in his interviews, people stated he had thrown the ax 30-40 feet, in a hurling motion. Watts said no.
 - H. Kullman asked, "have you ever pounded on equipment at work? Beat things, just pissed off, jut beat it, hit it, hit it continuously." Watts said no. Kullman asked if he had hit tools against other things, like a compressor. Watts said he had hit the

compressor a couple of times with the wrench to get it loose.

- I. Kullman stated that one issue was that Watts had allegedly stated to co-workers he has access to explosives on a mine that he worked at as a second job. All of his co-workers, who are tough mountain men, are afraid of him in part because of their belief that he has easy access to explosives and explosive devices. He asked if Watts had ever told any of his co-workers that he routinely uses explosives at work at the mine. Watts said he helps Mr. Mosch with explosives, and that he had told his co-workers about it. Kullman asked if he had ever told his coworkers he has access to those explosives. Watts said no, and that he has no access to them. Watts then gave Kullman his mine boss's name and telephone number.
- J. Kullman asked Watts if he had shared stories with co-workers regarding his use of guns around other people that potentially could be threatening to those people. He gave as examples: the previous summer, in the mountains, he had used a gun to threaten people and to scare them away, whether he had fired shots at individuals in an effort to have them leave the area. Watts' attorney answered that no shots were fired at anyone, and that he had not said that to co-workers. The other instance was: using a shotgun when animal control people were on his property and he fired shots into the air to threaten people. No answer was provided.
- K. Kullman asked if Watts drives by Shawn Frey's house. Watts described in detail his route to work, which included driving by Frey's house, and sometimes stopping to pick around in the mountains nearby with his rock hammer. Watts stated that Shawn had some raccoon problems and he took some light traps up there to get rid of them, as a favor. Kullman asked if he drives by his house a lot. He said no. He asked if he ever just parks in front for a few minutes. He said no. He asked if he ever comments on observations about his property, such as, "I see Shawn picked up a 57 Chevy." Watts said yes.

101. In the course of the pre-disciplinary meeting, Watts informed Kullman of the following regarding safety issues:

- Kullman asked him about safety issues, specifically pre-trip and post-trip inspections. Watts indicated that when he mentioned to Kramarsic that some crew members were not doing inspections, Joe said "don't worry about it." Watts admitted to not always doing the paperwork for those inspections;
- He stated that after calling Kullman in March 2002 about continued safety violations, at his April 2002 performance review, Kramarsic and the foremen present made it clear he could not go up the chain of command unless he went through them (Kramarsic or Lovato) first, and that he should let safety issues go;
- He stated he had mentioned safety issues out on the roads several times to the M II's, and they told him "we are not going to get bogged down with the safety crap around here";
- He stated that Kramarsic had told him he didn't want to get the foreman down there, on the Loveland site;
- When he mentions safety issues, within a week or two Shawn tells him to keep his mouth shut, if you can't handle it, quit. Shawn says this in front of Kramarsic, who

does nothing.

102. Following the R-6-10 meeting, Kullman directed Martinez to contact Mr. Mosch, Watts' employer at the mine, and Ty Anderson. Mosch gave Watts a glowing reference. Anderson, who worked on a different crew, confirmed that Watts had thrown the ax 20 or 30 feet.
103. CDOT's workplace violence policy, Policy Directive 10.0, defines workplace violence as follows: "conduct in the workplace against employees, employers, or outsiders committed by [employees] . . . involving (1) physical acts against persons or their property, or against CDOT property; (2) veiled or direct verbal threats, profanity or vicious statements that are meant to harm and/or create a hostile environment; (3) written threats, profanity, vicious cartoons or notes, or other written conduct that is meant to threaten or create a hostile environment; or (4) any other acts that are threatening or intended to injure or convey hostility."
104. Policy Directive 10.0 encourages appointing authorities to utilize the Threat Assessment Team of experts in assessing potential workplace violence situations. The policy also contains an Attachment 1, Threat/Violence Incident Report form, which is to be completed and submitted to the appointing authority within 24 hours of a workplace violence incident.
105. Kullman concluded that Watts had engaged in a number of violations of Policy Directive 10.0. On June 10, 2002, he sent a termination letter to Watts. The letter cited the following: the December 3, 2001 Corrective Action, and his continued violation of the Workplace Violence Policy; his behavior on April 25, 2002 towards Greg Goodland (ignoring him, pushing him aside, beating on the compressor with a pipe wrench, resulting in Goodland leaving the worksite fearful and frustrated); and "actions identified by your co-workers and direct management that are very troubling," including:
 - A. Continued temper tantrums. "It was expressed that you have temper tantrums 'conservatively about three times each week.' Sometimes you actually get in your personal vehicle and drive to defuse your anger. However, occasionally you resort to more dramatic actions. One such event occurred nearly 18 months ago, but has left a very lasting impact to all co-workers in the Paul area. This involved throwing an axe a very long distance of at least 30 feet. You indicated that it was a very short toss of less than 5 feet. Employees that witnessed this event have confirmed this event, including some that are not on your patrol."
 - B. Stalking of a co-worker - It was shared that you drive out of your way to go by Mr. Shawn Frey's house. You then make it clear to Mr. Frey and co-workers that you did drive by his house. You agreed you had done this - but only to take it easy on your drive to work. Additionally you have visited a bar where Mr. Frey's wife works, and have gone out of your way to talk with her. Lastly, you have come in contact with Mr. Frey's son. All of this has been shared with co-workers. At the R-6-10 you did eventually remember the contact with Ms. Frey at the bar. I find all of these behaviors threatening in nature and completely unacceptable."

- C. Silent stares - "All of your co-workers expressed concern over long silent stares at them. When they question this, you simply turn. You agreed that you just turn and 'be quiet.' Your co-workers indicated that this caused them to be fearful of you when this occurred."
 - D. Blame of co-workers - Once again all of your co-workers shared that you are always blaming them for problems in the shop. The M-2, Mr. Joe Kramarsic identified this as a huge problem which has resulted in extreme caution of you by your co-workers. An example is the occasional failure to complete a pre-trip/post-trip report. You agreed that even you forget to document them on occasion-yet when a co-worker fails you are very upset."
 - E. "Inability to 'let things so' - Even after issues have been dealt with you continue to be angry. You have expressed anger about the October 30, 2001 disciplinary action with co-workers as recently as this April. Additionally, the current corrective action on workplace violence has made you feel that members of CDOT are out to get you."
 - F. Sharing stories that involved violent behavior - "During the recent months you have told Mr. Goodland stories where you utilized a gun to intimidate individuals, twice when shots were actually fired. At the R-6-10 you did not respond. I find these conversations to be veiled threats to Mr. Goodland.
 - G. "Access to guns and explosives - Over the winter you have discussed shooting guns on your own time. Additionally, you have been very vocal about your access to explosives at the mine. While the mine confirmed your inability to access explosives, I believe these stories of weapon use and access to explosives did occur, and are veiled threats."
 - H. Throwing tools. "It is my determination that you continue to have frequent outbursts occasionally with tools being tossed." He considered this a violation of the corrective action.
106. Kullman summarized that all of the above behaviors created a threatening and hostile work environment for co-workers, in violation of the workplace violence policy, that could not be tolerated.
107. Watts' credibility at hearing was weak. As cross examination drew on, and he was caught having made statements at hearing that conflicted with those he had made in his deposition, his attitude towards the proceeding and opposing counsel's questions deteriorated. He became flip and even sarcastic at times.
108. Kramarsic's credibility was also weak at times. He evaded many questions on cross-examination.
109. Gregg Goodland was the most credible witness and served to corroborate Respondent's case. He left CDOT in May 2002, one month after Watts was placed on administrative leave. He was Watts' friend until the April 25 incident, and as an ex-employee now residing in another state, presented as an entirely unbiased witness.

DISCUSSION

I. Standard of Proof.

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. art. 12, §§ 13-15; § 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct or violation of the State Personnel Board rules or the rules of the agency of employment;
- (3) willful failure to perform or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen, supra*. The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. Complainant committed the acts for which he was disciplined.

As the findings of fact above make clear, Watts did engage in the acts for which he was terminated, outlined clearly in the termination letter. Frey and Garvin's mistreatment of Watts is duly noted. They unquestionably made inappropriate and harassing comments to Watts, which Kramarsic should have firmly addressed and did not. Unfortunately, the record was unclear about how often this occurred. However, once Watts requested a transfer away from them, he received it, and after that transfer in the late summer of 2001, Watts had contact with those two individuals only during shift changes, approximately thirty minutes each day. Moreover, if Frey's verbal harassment of Watts continued after his transfer to the later shift, he never reported it to managers.

It was perfectly within Watts' power to decide to put Shawn Frey out of his mind, forget about the past, and simply focus on doing his job during the eight hours of his shift Frey and Garvin were not present. Watts actually enjoyed working with Haskins and Goodland, and could have had a completely positive work experience with them. For some unknown reason, he was unable to do this.

The record demonstrates that ultimately, Watts' inability to control himself resulted in his festering hostility being directed at Goodland, who up to April 25 had been his closest ally. It is Watts' inability to control his rage as it related to Goodland that is most troubling of all, because it demonstrates that he apparently had lost his ability to put a check on his own behavior, i.e., in this instance, to distinguish between friend and perceived foe.

Watts' behavior violated CDOT's workplace violence policy, Policy Directive 10.0, in a number of ways. He engaged in "physical acts against . . . CDOT property." His silent and hostile

stares were intended to and did create a threatening and hostile environment for his co-workers. His stories about inappropriate gun use and access to explosives, when combined with his throwing and banging on tools in angry outbursts, caused others to view him as a very real potential threat. His hostile treatment of Goodland on April 25, including pushing him aside in an angry manner, extended the hostile and threatening work environment to Goodland. In sum, Watts' escalating inability to control his expression of anger and hostility created a hostile work environment for his co-workers that was intolerable.

III. Respondent's action was not arbitrary, capricious or contrary to rule or law.

A. Respondent did not violate State Personnel Board Rule R-6-5.

Complainant asserts that he was terminated for much of the same conduct that led to the December 2001 Corrective Action. State Personnel Board Rule R-6-5 states in part,

"An employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature. Corrective and disciplinary actions can be issued concurrently." Board Rule R-6-5, 4 CCR 801 (2002).

Watts was not terminated for the conduct that led to his December 2001 Corrective Action. He was terminated for continuing to engage in much of the conduct proscribed by that Corrective Action: continued temper tantrums that occurred after December 2001; throwing tools, such as when Kramarsic asked him about a truck he had driven; directing his hostility at Goodland on April 25 by refusing to talk to him, pushing him aside, and banging on the tools in an angry manner; throwing the ax; staring at co-workers in a hostile manner, causing them to be fearful of him; stalking Frey, causing Frey and his wife to fear for their safety; and sharing stories about his violent behavior, such as discharging a gun to intimidate other people on two separate occasions, causing Goodland to become fearful of him.

B. Respondent did not violate the Colorado Employee Protection Act.

Complainant argues that he was terminated in retaliation for making protected disclosures regarding safety violations on the Loveland Patrol. The Colorado Employee Protection Act, section 24-50.5-101 *et seq.*, C.R.S. ("whistle blower act" or "Act") protects state employees from retaliation by their appointing authorities or their supervisors because of disclosure of information about state agencies' actions which are not in the public interest. *Ward v. Industrial Com'n*, 699 P.2d 960, 966 (Colo. 1985). The purpose of the Act appears in the legislative declaration, which states,

"The general assembly hereby declares that the people of Colorado are entitled to information about the workings of state government in order to reduce the waste and mismanagement of public funds, to reduce abuses in governmental authority, and to prevent illegal and unethical practices. The general assembly further declares that employees of the state of Colorado are citizens first and have a right and a responsibility to behave as good citizens in our common efforts to provide sound management of governmental affairs. To help achieve these objectives, the general assembly declares that state employees should be

encouraged to disclose information on actions of state agencies that are not in the public interest and that legislation is needed to ensure that any employee making such disclosures shall not be subject to disciplinary measures or harassment by any public official." Section 24-50.5-101, C.R.S.

The threshold determination is whether Watts' disclosures fell within the protection of the Act. *Ward v. Industrial Comm'n*, 699 P.2d 960 (Colo. 1985). The Act defines "disclosure of information" as the "provision of evidence to any person or the testimony before any committee of the general assembly, regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency." Section 24-50.5-102(2), C.R.S. Watts' disclosures to his supervisors and Kullman regarding repeated safety violations by crew members, which, if true, would constitute violations of state and federal law, are protected by the Act. The safety regulations serve a critical public interest of maintaining public safety on the highways. Failure to wear safety vests could result in a driver having to slow down or stop suddenly, causing an accident. CDOT failure to enforce the rules could result in imposition of a fine on CDOT. The Act's purpose is to promote disclosures to prevent "illegal" practices, and managerial failure to enforce federal and state safety regulations clearly falls under that umbrella.¹

The next determination is whether the protected disclosures were "a substantial or motivating factor" in CDOT's decision to terminate Watts. *Ward*, 699 P.2d at 968; Section 24-50-103(1), C.R.S. Watts has failed to prove that Kullman was motivated at all by his disclosures regarding safety violations. First, Kullman responded to Watts' October 30 disclosures by immediately directing Lovato to investigate the issue and address it. Both Goodland and Richard Nelson James, Watts' own witness, confirmed that Lovato was successful in addressing safety issues on the patrol. That testimony corroborates Respondent's contention that after his disciplinary action for the positive drug test, Watts' incessant complaints about safety violations were motivated not so much by real problems as by his desire to attack co-workers he disliked.

Kullman was present at the fatal shooting of a CDOT employee in 1999. That experience caused him to be highly sensitized to the potential for violence in the workplace. Following that experience, he received intensive training in recognizing and handling early signs of potential workplace violence. Kullman's response to Watts' behavior was appropriate: he utilized progressive discipline, first imposing a corrective action defining the problem behaviors and drawing a line in the sand; then, after the behaviors continued, and it became clear to him that Watts was not able to control his anger in the workplace, he engaged the assistance of the Threat Assessment Team. Based on the Team's initial assessment, and then his own investigation, he determined that Watts was either unwilling or unable to curb his hostile, escalating behavior at work. With two employees and their wives fearing for their safety, he appropriately felt he had

1 The Act actually requires two separate disclosures in order to secure its protection. It states, "It shall be the obligation of an employee who wishes to disclose information under the protection of this article to make a good faith effort to provide to his supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure." Section 24-50.5-103(2), C.R.S. Watts disclosed the failure to enforce safety violations to Kullman at the October 30, 2001 meeting, and then repeatedly thereafter to his direct supervisor Kramarsic and others. He has met the disclosure requirements of the Act.

no choice but to permanently remove Watts from the workplace. Watts presented no evidence demonstrating that Kullman was motivated to terminate him on the basis of his complaints about safety violations.

Even if Watt had demonstrated that Kullman was motivated by his protected disclosures in terminating him, CDOT would then have the opportunity to prove that "it would have reached the same decision even in the absence of protected conduct." *Ward*, 699 P.2d at 968. The Findings of Fact and discussion above make it clear that CDOT would have reached the same decision even in the absence of Watts' protected conduct. Therefore, Watts cannot prevail on his whistle blower claim.

C. Respondent Did Not Violate R-6-10, Despite its Misunderstanding of the Rule

Complainant avers that Respondent violated Board Rule R-6-10, which governs pre-disciplinary meetings, by failing to comply with his repeated requests for a list of the specific allegations against him.

State Personnel Board Rule R-6-10 states in part:

"When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision"

Kullman made a number of erroneous statements regarding his obligations under R-6-10 at the pre-disciplinary meeting. For instance, he stated, "We have on record that I'm not required to give you the names or what people are saying in these areas for fear of retaliation." That is incorrect. Rule R-6-10 mandates that agencies "present information about the reason for potential discipline," and "disclose the source of that information unless prohibited by law." Neither Kullman nor counsel for Respondent cited any law that exempts agencies from disclosing information based on a fear of retaliation. In the absence of such, the rule mandates a sharing of all available information regarding the reasons for potential discipline and the sources thereof.

Rule R-6-10 does not mandate that a written report or written notes in the possession of the appointing authority be produced at the pre-disciplinary meeting. Therefore, Kullman acted within his discretion to refuse to share his notes on interviews with the Loveland crew. However, to comply with the rule, appointing authorities must share the contents of such reports and notes. Without full disclosure of the information upon which discipline might be based, the employee has no meaningful "opportunity to respond," i.e., defend himself, which is the **central purpose of the meeting**.² "Such a 'meeting' must afford the employee a reasonable chance of

² Any appointing authority in possession of information at a pre-disciplinary meeting who refrains from sharing it runs the risk of that information being barred at hearing on a motion in limine.

succeeding if he chooses to avail himself of the opportunity to defend himself." *Shumate v. State Personnel Bd.*, 528 P.2d 404 (Colo.App. 1974).

Complainant asserts that Kullman's approach to the exchange of information at the pre-disciplinary meeting was too vague. Kullman chose to share the information he had primarily by asking questions; the rule does not prohibit this. As Finding of Fact No. 100 demonstrates, while some additional detail might have been helpful, Kullman's questions did put Watts on notice of the specific behaviors for which he might potentially be disciplined. In addition, Kullman's questions provided Watts with the opportunity to respond.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

INITIAL DECISION

For the reasons set forth above, Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of
April, 2003, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln St., Suite 1420
Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of

the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the _____st day of April, 2003, I served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE and Notice of Appeal Rights** by placing same in the United States mail, postage prepaid, addressed as follows:

Susan J. Tyburski
Boyle & Tyburski
1439 Court Place
Denver, CO 80202

and by courier pickup to:

Hollyce Farrell
Assistant Attorney General
Employment Law Section
1525 Sherman, 5TH Floor
Denver, CO 80203
